United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1405

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1405

B P/S

UNITED STATES OF AMERICA,

Appellant,

- against -

MICHAEL KAZUIO YANAGITA and
MARC CHOYEI KONDO,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York,

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

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REPLY BRIEF FOR THE APPELLANT

This brief is submitted by the United States in reply to the brief filed by the appellee. We believe that only the arguments made in Point I of appellee's brief require any written response.

We begin by observing an area in which we are on common ground. We agree with the appellees that "a witness in a federal criminal trial has the right to decline to answer questions derived in whole or part from unlawful electronic surveillance of the witness" (Br. p. 4a-5)

and that an order directing a witness to answer such questions is not "lawful" within the meaning of 18 U.S.C. 401. Here, however, there has been no showing that any such questions were put to the appellees. Rather they claim that, because the United States failed to properly respond to their demand pursuant to 18 U.S.C. §3504(a)(1), to affirm or deny the existence of any illegal electronic surveillance, the order directing them to answer was not a "lawful" order.

Our submission is that the procedure set out in Section 3504(1)(a) is essentially a discovery device to enable a prospective witness to determine facts necessary to make the "showing that interrogation would be based upon the illegal interception of the witnesses' communication" necessary to justify a refusal to testify. Gelbard v. United States, 408 U.S. 41, 45, 54-55 (1972). A witness seeking to invoke the discovery provisions of Section 3504 and the suppression provisions of Section 2515, which may require a full blown taint hearing, prior to testifying, must do so in a timely manner, just as a defendant would be required to do. He simply is not free

to make it any time prior to testifying regardless of the "damage to orderly trial proceedings", to use Judge Dooling's words (A. 313).

Before exploring this issue further, it is best to clarify the facts regarding when the Section 3504 motion was made. The appellees claim that, contrary to the suggestion in our main brief where it was said they made their motion in the midst of trial, it was actually made "prior to the commencement of the Chin trial" (Br. 9-10). This claim is, to say the least, misleading.

The Chin trial was scheduled to commence at 10 A.M. on June 21, 1976, as both appellees had been advised long before, and they were subpoenaed to appear and testify at 10 A.M. on that day. The record shows that a six minutes after 10 A.M., just prior to the commencement of jury selection, the Assistant United States Attorney was served with the appellees motion papers (Tr. ' and that Chief Judge Mishler declined to delay the selection of the jury after having ascertained from appellee's counsel that they had been served "sometime ago" (Tr. 10).[1/]

Although we apologize for having left the impression in our brief that the motion was made after the jury was

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1/ The relevant pages of the transcript are annexed hereto as Exhibit A.

selected, having relied on portions of the transcript of the Chin trial which were collected by the Assistant United States Attorney who tried the case and which inadvertently omitted the first ten pages of the trial, we believe that this difference does not materially affect our basic argument. Surely if the defendants Chin and Young had waited until six minutes after the trial was scheduled to begin to commence discovery to determine if they were the subject of an illegal surveillance and to demand a "taint" hearing as to the source of the evidence, Chief Judge Mishler would have been justified in saying to them, as he said to the appellees, "the motion comes too late" (A. 188). See, e.g., United States v. Campisi, 306 F.2d 308, 311 (C.A. 2, 1962) and cases cited in our main brief. Such a motion which also failed to comply with the five day notice requirement of Rule 3 of the Criminal Rules of the Eastern District, is only marginally less disruptive of orderly trial procedures then one made after the trial has begun. Here, as in United States v. Wilson, 421 U.S. 309 (1975), "the court, the parties, witnesses and jurors [were] assembled in the expectation that [the trial] will proceed as scheduled"

(421 U.S. 318). Judge Dooling here alluded to "the unfortunate effect of the tactics resorted to by counsel for the defendants" (A. 312) and concluded that "Gelbard as extended to the trial witness requires further scrutiny in the appellate courts (cf. Stone v. Powell, 1976 ___U.S.___, 96 S.Ct. 3037, 49 L. Ed 2d___), or perhaps better by Congress, is clear" (A. 313).

We believe that the flexable approach taken in Mr. Justice White's concurring and deciding opinion in Gelbard, and the other authority cited in our main brief, provides ample basis for a rule requiring that trial witness, who wishes the advantage of a hearing on the source of the questions put to him, prior to testifying, must proceed in the same timely fashion as a defendant. Absent some just cause for an untimely motion, an order directing a witness to answer is not unlawful provided that it is shown prior to the criminal contempt trial that there was no illegal surveillance.

We proceed to examine the appellees arguments to the contrary.

1. The Case Law

The appellees claim that they need not "tarry" over the argument that a trial witness may not decline to

answer questions on the ground they may be derived from illegal electronic surveillance "if the witness has had ample notice of his appearance and the facts upon which his claim is based" This argument they suggest "is but a sideways effort to reargue [United States v. Huss, 482 F.2d 38 (C.A. 2, 1973)] to the very court which decided it" (Br. 5-6, n.5). According to appellees in United States v. Huss, the witness had several months notice before being called to testify and did not file his motion until three days before trial. But, appellees claim "this Court upheld his statutory right despite these circumstances and despite the fact his claim required a postponement of an important trial for almost four months in order to conduct a trial hearing" (Br. pp 5-6, n.5).

The opinion in Huss supports no such proposition. In Huss, the United States affirmed the existence of illegal electronic surveillance and a taint hearing had already been held by the time the appeal from the contempt order was heard in Huss. Since the issue of the timeliness of the motion pursuant to Section 3504 was already mooted by the proceedings below, Huss hardly constitutes any

authority for the appellees position. Moreover, Huss was a civil contempt case, in which the witness is ordered incarcerated immediately for his failure to answer, and there is no other opportunity to determine if the questions put to him were the product of illegal electronic surveillance. The present case, however, involves a criminal contempt and the defendant has such an opportunity prior to the imposition of any penalty.

2. The Finding of the District Court

The district court below found that "[t]here was not a sufficient evidentiary base to support a conclusion that the motion was unduly delayed and could not be regarded as timely". This finding of appellee's claim is "supported by the record" (Br. 10).

This finding is wholly unsupported by the record. The record shows that the motion was made on the return day of the subpoena and that both defendants had over thirty days notice of their appearance. Moreover, the motion failed to comply with Rule 3 of the Criminal Rules of the Eastern District which requires five days notice prior to the motion. It was, in short, untimely on its face. The real issue is whether there was an adequate excuse to justify the dealy.

Quite obviously there was no such excuse - indeed, speaking of the absence of a sufficient "evidentiary base",

there was never even a sworn affidavit explaining the delay and the excuse offered is wholly inadequate.

Thus, in order to correct what appellees characterize as the government's "basic method" which "has been to missate facts (Br. 18), the appellees state (Br. 8-9):

> Appellees each reside in southern California. Kondo, who the government had not subpoenaed in the first trial, was served with a subpoena returnable Monday, June 21. Because Kondo lived in California, counsel were not able to meet him to discuss his legal situation prior to his coming to New York. Counsel so advised Ethan Levin-Epstein, the Assistant U.S. Attorney prosecuting the Chin case, and asked whether arrangements could be made so that Kondo could travel to New York a few days in advance of the trial in order to confer with counsel. Levin-Epstein made arrangements so that Kondo could travel to New York the evening of Thursday, June 17. This was the first time Kondo had been in New York since being subpoenaed.
>
> Counsel met with Kondo for the first time at their offices on Friday, June 18. In the course of discussion, facts were disclosed which led counsel to believe the prospective trial questioning of Kondo might be drived from electronic surveillance of him or his residence. Kondo was informed that if this were true he would have the right to decline to answer such questions. Accordingly, motion papers were prepared together with affidavits setting forth the facts Kondo had disclosed to counsel which formed the baiss of his claim of surveillance.

> Appellee Yanagita arrived in New York on Sunday, June 20 and met that day with counsel. Armed with the facts disclosed in the discussion with Kondo two days earlier, counsel questioned Yanagita as to the possible basis for a belief he or his residence had been the subject of surveillance. The facts thereby adduced were likewise incorporated into affidavits and a motion prepared.

This "accurate" statement of facts fails to say that the subpoena was served on Mr. Kondo on May 18, 1976 and a copy was sent to Mr. Reif, appellees lawyer, on May 10, 1976, (A.141-142). There was more than ample time for Mr. Kondo to come to New York to meet with Mr. Reif or communicate with him by letter or telephone prior to June 17, 1976. His decision to come to New York when he did was his own. Indeed, contrary to the implication of appellee's statement, Mr. Levin-Epstein did not select June 17, 1976, rather he was willing to cooperate by authorizing advance funds for a trip to New York prior to the return day of the subpoena when the request was made to him.

Mr. Yanagita's excuse is even less compelling. He, it seems, never had any idea in his mind that his telephone was tapped until Mr. Reif "armed with the facts disclosed by Mr, Kondo" put it there. Mr. Yanagita's never raised the claim at the first trial and it is obvious that Mr. Reif

suggested it to him as anyother means to avoid testifying. Neither of these lame explanations is, in our view, sufficient to justify the failure to comply with the Criminal Rules of the Eastern District and the failure to file the Section 3504 motions a reasonable time before the day the trial began.

3. Concluding Statement

The "concluding statement" of appellees on this issue is a model of disingenuousness. They say first that they fail to understand "the relevance ....to the case at hand" of an expressed concern about "delay" and "disruption" (Br. 24). After spending page after page of the brief attacking the adequacy of the A.T.F. denial (Br. 16), after lecturing the district court on the necessity of conducting a thorough and careful check, "very carefully and exhaustively", because quick oral checks often "turned out to be incorrect" (A. 182-183), and after demanding sworn statements from each agency, they conclude by saying the government made "proper" inquiry of A.T.F. in less than a day (Br. 24), and there is no reason why similar inquiry could not have been made to other agencies in the same manner.

The answer is, of course, that these checks to be "proper" must be conducted carefully, that often people who are overheard do not always identify themselves by their full name, or by their real name (see, United States v. Smilow,

472 F.2d 1193 (C.A. 2, 1973),[2] and that such checks require more than the "one hours work by a file clerk" to which Judge Newman alluded to in In Re Turgeon, 402 F. Supp. 1239, 1242 (D. Conn. 1975), which involved the more limited inquiry whether the premises of several persons were subject to surveillance.[3] Moreover, it must be emphasized that the relief the appellees sought here was more than a simple discovery request as to whether they were the subject of electronic surveillance but, ultimately, if the answer was in the affirmative, a full blown taint hearing which would be even more disruptive (A. 90, A. 96-97). See United States v. Huss, supra, 482 F.2d 45, n.6.

Contrary to appellees claims, we do not suggest that delay in dealing with their application would, without more, justify denying their Section 3504(a) motion. Rather, it is our view that unjustified delay does limit their right to litigate the wrietap issue to the contempt proceeding itself and deprives them of the advantage of litigating the matter before testifying. The principle that the right to obtain suppression of evidence may be lost by failure to

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2/ We annex hereto as Exhibit B, a copy of the Department of Justice procedures which must be followed to make a "proper" check in response to a section 3500 request.

3/ Moreover, even in that case, upon which appellees rely (B. 28, n.23), Judge Newman showed his sensitivity to the issue of the effect of delay caused by Section 3504(a) motions (402 F.Supp. at 1241-1242).

timely assert claims is one that is by no means novel. Indeed, it was expressly written into the Federal Rules of Criminal Procedure by the Supreme Court and approved by Congress. F.R. Crim. Proc. Rule 12(b)(3) and 12(f) (416 U.S. 1003). See United States v. Mauro, 507 F.2d 802 (C.A. 2, 1974), certiorari denied, 420 U.S. 991.

CONCLUSION

The judgment of the district court should be reversed.

Dated: January 10, 1977.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
Of Counsel.

EXHIBIT "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

-against- : 75-CR-651

KENNETH RAYMOND CHIN, ELIZABETH JANE YOUNG, now known as ELIZABETH JANE YOUNG CHIN. :

Defendants. :

----------X

United States Courthouse
Brooklyn, New York

June 21, 1976
10:00 o'clock A.M.

B e f o r e :

HONORABLE JACOB MISHLER, Chief U.S.D.J.

ILENE GINSBERG
OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: ETHAN LEVIN-EPSTEIN
Assistant U.S. Attorney

WILLIAM LEIBOWITZ, ESQ.
Attorney for Defendant K.R. Chin

ELEANOR JACKSON PIEL, ESQ.
Attorney for Defendant E.J.Y. Chin

MR. LEVIN-EPSTEIN: Ready for the Government, your Honor.

MR. LEIBOWITZ: Defendant Chin is ready.

MS. PIEL: The defendant Elizabeth Jane Young Chin is ready.

However, having filed on Friday a notice of appeal from your Honor's denial of the dismissal of the indictment I now request your Honor for a stay of the trial.

THE COURT: Denied.

You understand that the right to appeal is from a judgment of conviction. There is no right to appeal from an order of dismissal.

MS. PIEL: May I ask your Honor to look at a case in the Second Circuit which I believe is right on point.

Would your Honor look at that case before you make a final judgment, and that is U.S. v. Beckerman, 516 F. 2d 905 which is a recent case.

THE COURT: Yes, and in the meantime I'll draw a jury.

MS. PIEL: I earnestly request you to look into it before --

THE COURT: This is not the first time I have

MR. LEVIN-EPSTEIN: Prior to the commencement

denied a motion and some that had a basis, at least as strong as yours, where I have just gone to trial on it.

This is the first time where a motion to dismiss an indictment, denial of a motion to dismiss has been appealed. That's all.

MS. PIEL: It's not the first time, your Honor. As I say, you will see --

THE COURT: I say, in my experience, in my experience.

MS. PIEL: Would you look at the case before we proceed?

THE COURT: Sure, I'll look at it but in the meantime, call a jury.

THE CLERK: Yes.

MR. LEVIN-EPSTEIN: For the record, I have received no notice of such an appeal motion --

MS. PIEL: The Clerk is supposed to serve you, Mr. Levin-Epstein.

MR. LEVIN-EPSTEIN: That's up to the Clerk, Ms. Piel.

While awaiting the call of the jury panel let the record indicate that all 3500 material in this case has been turned over to counsel for both defendants.

THE COURT: Has it been marked?

case? MR. LEVIN-EPSTEIN: Prior to the commencement of the last trial and the Government represents it is the same 3500 material. The Government would also request at the commencement of this trial that witnesses for both sides be excluded during the taking of testimony or any preliminary matters with the exception of the case agent, of course.

THE COURT: Any objection to that?

MR. LEIBOWITZ: No objection.

MS. PIEL: No objection, your Honor, except perhaps as to the case agent. I want to reserve on that.

MR. LEIBOWITZ: Is this a case agent who will testify?

MR. LEVIN-EPSTEIN: I'm not sure yet.

MR. LEIBOWITZ: We will move to exclude any prospective witnesses --

THE COURT: I beg your pardon?

MR. LEIBOWITZ: I am asking to exclude any prospective witnesses, whether a case agent or not.

THE COURT: Who is the case agent?

MR. LEVIN-EPSTEIN: Steven Ryber from the Bureau of Alcohol, Tobacco and Firearms.

THE COURT: Is he necessary for the orderly and proper submission of the evidence in the Government's

case?

MR. LEVIN-EPSTEIN: Without question.

THE COURT: All the witnesses in the case on trial, please retire to the witness room except Special Agent Ryford, did you say?

MR. LEVIN-EPSTEIN: Ryber. He is not present at this time but I do anticipate his presence during the rest of the trial.

Let the record also indicate that for the first time this morning I have been served with documents entitled, Michael Yanagita re: electronic surveillance which I don't know what that is about and Mark Kondo and also a motion to quash a subpoena served upon Mark Kondo and I don't know what that is about. I would like the record to indicate that I have just received these documents and it is now six minutes after ten.

THE COURT: I am trying to read U.S. v. Beckerman while you are talking -- would you read that back for me, please?

(Record read by Reporter.)

THE COURT: When did you serve the subpoena on Mr. Kondo?

MR. LEVIN-EPSTEIN: There is a motion to quash --

THE COURT: When was the service of the subpoena?

MR. LEVIN-EPSTEIN: According to the U.S. Marshal's records in California, Mr. Kondo was served on May 18 of this year.

THE COURT: Who served the motion to quash?

MR. LEVIN-EPSTEIN: I was served by Mr. Reif who, I understand, is counsel to Mr. Kondo as well as Mr. Yanagita.

THE COURT: Oh, where is Mr. Reif?

MR. LEVIN-EPSTEIN: Mr. Reif accompanied his client outside according to the Court's instructions.

THE COURT: Ask Mr. Reif to come in.

MR. LEVIN-EPSTEIN: I would ask the Court to consider, prior to the selection of the jury, my request that counsel for the defense turn over an address book in their possession and certain other documents taken by Mr. Leibowitz, I believe, at the time of his client's arrest, at which time I believe he signed a receipt.

MR. LEIBOWITZ: Tell me which they are.

MR. LEVIN-EPSTEIN: Certainly. The address book and the two disposition slips given to you. You gave them to me and Mrs. Piel took them almost immediately.

MS. PIEL: I don't have them with me. If I had them I don't know where they are. It may be that I have them at my office. I don't know, I really don't.

THE COURT: I have read Beckerman and I find that this case falls within the general rule that interlocutory orders are not appealable and not under the exception of Beckerman.

MS. PIEL: I am moving at this time for a stay by the Second Circuit and serving Mr. Levin-Epstein with my papers and I would like him to acknowledge receipt so I can go immediately to the Second Circuit to get a stay.

THE COURT: You may do that and I'd like the Government to advise the Second Circuit that they should, out of hand, and directly disapprove of the practice of serving these papers at the beginning of trial.

I set aside -- I adjourned every other case and set this case down for trial.

I could have tried U.S. v. Chiappe and Russo which is a case involving defendants in custody. But I set this down for trial oh, possibly a month ago.

My calendar last week -- and you may tell this to the judges in the Court of Appeals -- I think it's about time the Court of Appeals said to the lawyers, think of the judges' calendars in addition to your own tactics.

Last week I had U.S. v. Jones and Ramos;

U.S. v. Jiminez; for today I had U.S. v. St. Claire; U.S. v. Felippo and I put Russo and Chiappe down -- these are two defendants in custody -- for the 28th just to keep an eye on it. But I could have started the trial today.

However, Ms. Piel, apparently for tactical reasons, decided she would surprise the Government by serving a notice of appeal and making an application for a stay just as I was to pick a jury.

MS. PIEL: For the record, I'd like to state that this is not a tactical motion.

I received a copy of your Honor's order denying my motion to dismiss on Thursday. I filed a notice of appeal on Friday and determined that it was appealable some time on Friday. Accordingly, I was in no position to do anything prior to this time.

Moreover, I didn't know what the status of the matter really was nor is there any reason why your Honor can't go forward with the Chin case.

THE COURT: Oh, this is really a motion to sever. That's what it is.

All I can say is, I wanted to tell the Court of Appeals that this is disruptive and we have enough problems keeping up with our calendar.

(Whereupon, Mr. Reif entered the courtroom.)

THE COURT: Mr. Reif, this is another criticism I have.

When did you make your motion to quash?

MR. REIF: I served Mr. Levin-Epstein this morning.

THE COURT: When did you know that your clients were served with a subpoena to testify?

MR. REIF: I'm not sure of the exactdate. It was some time ago.

THE COURT: Why did you wait until today to serve the motion to quash?

MR. REIF: I didn't speak to Mr. Kondo until Friday.

Mr. Levin-Epstein is aware we had to make certain arrangements for him to come early so I could confer with him and the basis for the motion wasn't known to me until he came here and I spoke to him on Friday.

I would file the originals of the copies I gave to Mr. Levin-Epstein with the Court.

THE COURT: First of all, I'll pick a jury and then we'll take up the motion to quash.

MS. PIEL: I'd like Mr. Levin-Epstein to acknowledge service --

THE COURT: The record shows that you made a

EXHIBIT "B"

United States Attorneys

Bulletin

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UNITED STATES DEPARTMENT OF JUSTICE

POINTS TO REMEMBER

REQUESTS FOR DISCLOSURE OF ALLEGED ELECTRONIC SURVEILLANCE 18 U.S.C. §3504

The Criminal Division receives a substantial number of requests pursuant to 18 U.S.C. 3504 from Department attorneys and United States Attorneys' offices to verify if electronic surveillance has been conducted on defendants, grand jury witnesses, and/or their attorneys, etc. In order to respond to these requests, seven or more Federal agencies must be solicited in writing to search their files for the relevant data. The entire procedure, from receipt of the request in the Criminal Division to the dispatch of a reply by the Division, normally takes about 4 weeks.

In some instances, replies have taken longer. In order to avoid undue delays, please submit the following information for each individual who is the subject of such a request:

(1) true name and any known aliases;

(2) place and date of birth;

(3) FBI number or Social Security number;

(4) case title and docket number with which the request is associated if appropriate; otherwise, the purpose of the request;

(5) statute citation for charges involved or subject matter of the grand jury investigation;

(6) the time period for which the search is sought, usually the time from opening of investigation to arrest;

(7) home and business address of subject, and telephone numbers of telephones installed at all such locations during the specified time period.

To obtain as much of the above information as possible, it would be appropriate to solicit the assistance of the court at the time the motion is made.

Government attorneys should normally not request the Division to make Section 3504 verifications unless and until ordered to do so by a district judge.

(Criminal Division)

* * * *

Rec'd
4:40 PM 1/10/77
James Reed